

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOLAN CURTIS DUNCAN,

Defendant-Appellant.

UNPUBLISHED
December 8, 2000

No. 211083
Genesee Circuit Court
LC No. 97-000469- FC

Before: Markey, P. J., and Murphy and Collins, JJ.

COLLINS, J. (concurring).

I concur with the result the majority reaches in this case. I write separately because I respectfully disagree with the majority's conclusion that the trial court properly admitted other acts testimony, under MRE 404(b), concerning defendant's drug selling activities. I believe that the trial court abused its discretion in admitting that testimony, and that it compounded the error by admitting police expert testimony that because defendant was dealing drugs, he was likely to carry a gun. However, I conclude that these errors were harmless and do not require reversal of defendant's convictions.

The prosecution introduced evidence that defendant was a drug dealer who was selling cocaine from the home of Sandra Clark. However, the shooting of the decedent, Anthony Morris, was not drug related but took place because defendant hit Morris' niece. While the majority acknowledges that defendant's drug dealing was not directly related to the shooting, it finds evidence of defendant's drug dealing probative of the events that led to the confrontation between defendant and Morris and, therefore, probative of defendant's intent. However, the pertinent facts that led to the altercation between defendant and Morris can be traced to the original dispute between defendant and Morris' niece. When Morris' niece refused to answer a telephone and threatened to call the police on defendant, defendant struck her. The next day, Morris confronted defendant about this incident and the shooting took place during this argument.

Unlike the majority, I do not find this to be a close question. The fact that defendant was selling cocaine from the Clark home was wholly unrelated to the shooting. Defendant admitted to possessing a gun and to shooting Morris, but maintained that he shot Morris in self-defense. The fact that defendant did not want Morris' niece to call the police because he had a gun and

cocaine in is possession was not related to his intent in shooting Morris. Because the drug dealing was so tangential and otherwise unconnected to the central issue of defendant's intent in shooting Morris, I believe any modicum of relevancy was substantially outweighed by the potential for unfair prejudice. MRE 404(b); MRE 403; *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Furthermore, since it was uncontroverted that the defendant possessed a weapon, I do not believe police expert testimony that people who sell crack cocaine often carry guns "serve[d] to give the trier of fact a better understanding of the evidence or assist[ed] them in determining a fact in issue." *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993). The testimony simply was not relevant to any issue in dispute.

Notwithstanding the above errors, I agree that defendant's convictions should be affirmed. Given the strength and weight of the untainted evidence, it is not "more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

/s/ Jeffrey G. Collins